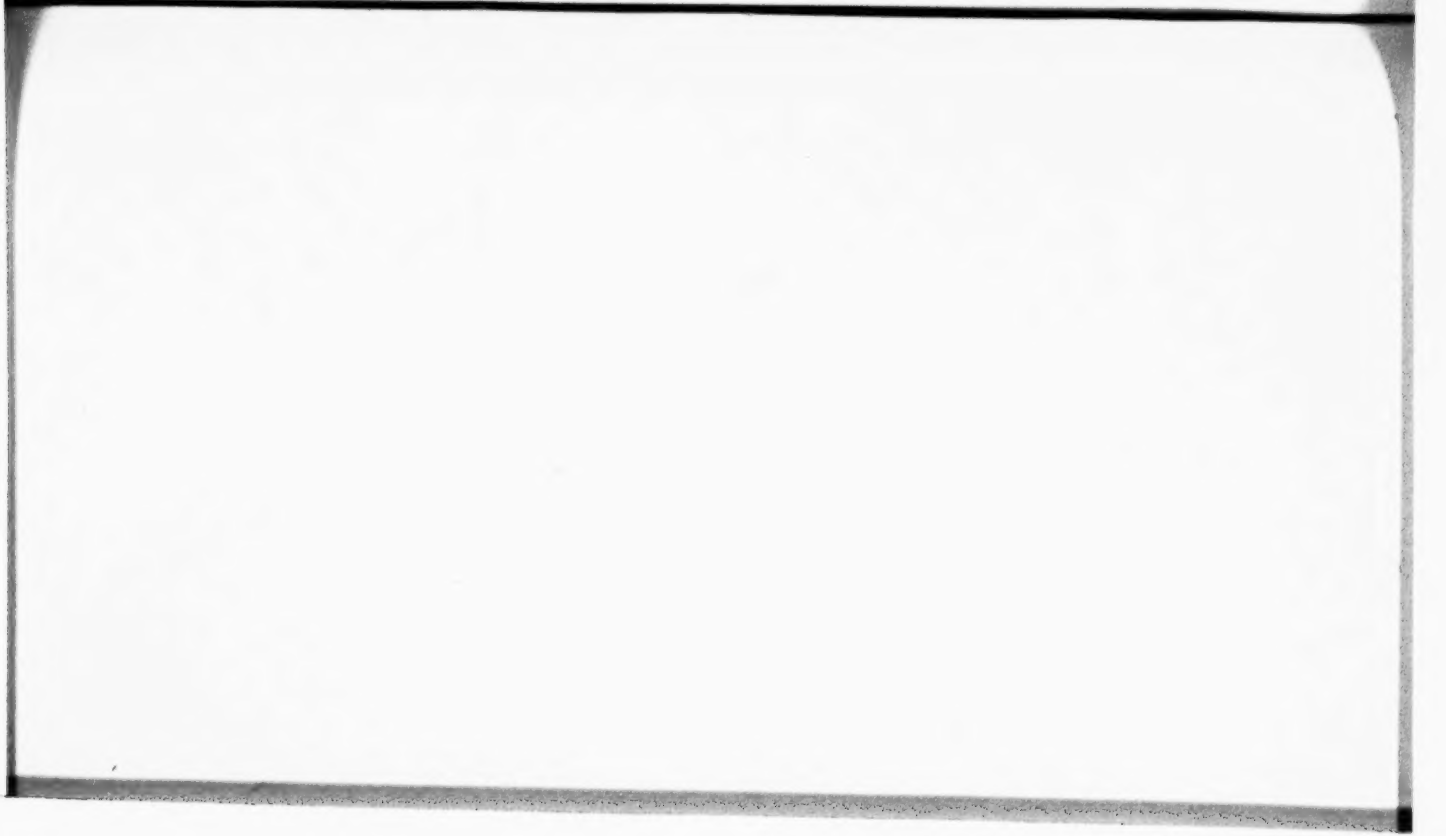

Office Supreme Court U.S.
FILED
MAR 14 1902
JAMES H. McKENNEY
Clerk

No. 191.

Reply Brf. of Johnson for Appellee

Filed Mar. 14, 1902.

IN THE SUPREME COURT OF THE UNITED STATES.

IN EQUITY.

Brainard H. Warner et al., *Appellants*, vs. *Lily Alys Godfrey, Appellee.*	Of October Term, 1901. No. 191.

APPEAL FROM COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APPELLEE'S REPLY TO APPELLANTS' BRIEF.

Owing to the late receipt of the brief of appellants, it is impossible to do more by way of reply than briefly to suggest a few thoughts.

It is devoted mainly to discussing three points: (1) a denial that appellants were the agents of Dutton; (2) a complaint that they were improperly refused an opportunity, after the amendment of the bill, to reopen the case; and (3) an objection to the disallowance of the amounts paid by them as expenses of litigation, including counsel fees, and of interest upon their advances. Under three heads we will briefly discuss these points:—

I. The evidence established the relation of principal and agent as between Dutton and the appellants.

Having in our preliminary brief quoted extensively from the testimony which established this relation, we do not deem it necessary to add much under this head.

It is not pretended the appellants ever explained to Dutton they were not his agents. The testimony of Mrs. Mussey, called by the appellants, shows conclusively they were not applied to, by her, to buy the property either for themselves or acting as agent for a client. She testified (Record 380), after referring to her interview with Messrs. Wine & Warner, when she first called upon them:—

> "I stated to him that I had a client who was forced to sell his property to raise money, and that if no better could be done I would dispose of it for him, I thought, at least he would dispose of it for the net sum of $25,000. I asked Mr. Wine if, in his opinion, a larger sum could be raised on it within a day or so. He said he did not think it could. * * * I returned to my office, and I think it was in the evening of the same day that Mr. Wine came to me with a contract or option for the sale of that property at $25,000, reciting a deposit of $500, and giving fifteen days to complete the sale."

Speaking of the settlement and of what was done by Dutton, she said:—

> "He handed one of those checks for $500 for the commission of Messrs. Warner and Wine to Mr. Edmondson, and the other checks he took, &c."

She further testified (Record 382):—

> "Q. When you went to Warner & Co., and offered the property for $25,000, what was said at the time about commissions? A. I arranged with them that I should have one-third of the commissions."

An agreement was presented to Dutton for his signature by the appellants, who, in their hurry to secure the property at a bargain, had not then heard his name. A blank for the name was therefore left. The agreement made the vendor (name in blank), however, a party of the first part, and Richardson, who was really not the purchaser, but the go-between of the appellants, a party of the second part. It recited that in consideration of the sum $500 paid to the party of the first part's "agents, B. H. Warner & Co., as a de-"posit," Dutton agreed, at a designated price, to sell to Richardson.

No actual payment of $500 was made either to Dutton or Mussey, though the agreement recited that as earnest money it had been paid by the vendee to the agents of the vendor. As this money was not received by Dutton, but was received, as the contract stated, by B. H. Warner & Co., its receipt could have been by them in no other capacity than as agents of vendor. Had they been supposed to be acting as agents for Richardson, compelled to pay $500 on account, they would not have been made the depositaries of the earnest money. It would have been anomalous had Richardson secured his completion of his contract by making deposit with his own agents. A payment to be made to the vendor and recited to have been made, could have been made only as was stated in the agreement, viz., to B. H. Warner & Co. as agents of the vendor.

We have a contract, signed by Dutton, stating upon its face that B. H. Warner & Co. were acting as his agents, which recited their receipt, as such agents, of the earnest money the purchasers were bound to pay to him, directly, or to some one acting on his behalf. We have a positive statement in said contract that Richardson was the purchaser. Superadded to this is the uncontradicted statement by Mrs. Mussey, that the agents' commissions for making sale were to be divided between herself and B. H. Warner & Co. We have the fact of the actual payment of commissions to B. H. Warner & Co. by Dutton, who would have known, if the firm was acting as agents of the purchaser, that they would

not, and could not, receive a commission from the vendor. Further, we have the uncontradicted statement of Mrs. Mussey, that in the beginning of her interview with one of the firm, she asked his opinion whether a larger sum than $25,000 could be obtained and his statement that he did not think it could. It is impossible that she would have taken the judgment of the agent of the purchasers as to what would be likely to be obtained in the way of a price.

We therefore submit, with great confidence, that the Court of Appeals was right in finding the appellants were supposed by Dutton to be acting as his agents, for a compensation agreed to be, and actually, paid to them by him.

II. The allowance of the amendment gave no opportunity to the appellants to reopen the case.

The amendment introduced into the controversy no new matter. Every party who knew anything concerning the relations of the parties, had been examined and cross-examined, at the greatest length. Warner, Wine, Richardson, Mrs. Mussey, and all other persons acquainted with the circumstances connected with the position of B. H. Warner & Co., had testified fully and exhaustively. All the appellants had filed answers stating their position in detail. The sole purpose of allowing the amendment was to make the allegation correspond with the proofs and with the modified relief to which, upon the proofs, the appellee was entitled.

The relations between the parties, and all the testimony connected therewith had been necessarily elicited under the issues made by bill and amended bills and answers and amended answers, as the same were of record when the Court of Appeals dealt with the matter. There is no question that any additional evidence existed, or could be produced.

The Court of Appeals found the fact of the agency upon consideration of the contract between Dutton and Richardson, and of the voluminous testimony which had been given by all the parties who had participated in the transaction.

We submit that the amendment was not necessary. It was within the power of the Court of Appeals, upon the pleadings and proofs, to have entered its decree. It preferred, however, that there should be a formal amendment by the appellee in which she would tender her readiness and willingness "to pay "to the defendants or any of them, upon a reconveyance to "her of said premises, such sum, if any, as the court may "find to have been paid by them or any of them on account "of said property, and which should in equity and good con- "science be repaid them by her."

Antecedently to filing this amendment, she had made no formal tender of her willingness in this respect. After the amendment she was bound by her tender and was precluded from claiming a reconveyance without reimbursement of expenses. Her tender, however, did not reopen the case, nor did it make such reopening necessary. The Court of Appeals expressed no intention that additional testimony should be taken.

From the beginning, the appellee demanded a reconveyance of the premises of which Dutton had defrauded her. Such was her original prayer for relief. Under the supposition that Richardson alone was interested in the conveyance the original bill was filed against him. When the interest of Warner and Wine was subsequently disclosed, it was amended, by including them as parties defendant. In every pleading the appellants filed, they maintained their right to insist upon a retention of the property. Whilst the appellee did not tender reimbursement of expenses, she asserted at all times a right the appellants denied, viz., the right to a reconveyance. The testimony under this issue developed every fact and circumstance relevant to such an issue. The amendment introduced no new matter. As we have said, it admitted a duty to reimburse actual expenditures in and about the property. Thereupon, the court decreed what the appellants had always in their pleadings refused, viz., a reconveyance, but upon the terms of making the then tendered reimbursement.

III. The circumstances antecedently to the filing of the amendment were not such as made it necessary to reimburse appellant for the expenses of the litigation, including their counsel fees; nor to pay them interest upon their expenditures in and about the property.

The appellants suggest that in an interview with the late Judge Wilson which took place many months after issue had been joined between themselves and the appellee, there was an offer by their cousel to Judge Wilson, to reconvey the premises upon terms of reimbursement of expenses. The evidence of this offer rests upon the testimony of Mr. Thomas (Record, 503). He said, *inter alia*:—

> "I told Judge Wilson that I thought it was a case where the complainant had probably been imposed upon by Dutton, and where Mr. Warner had made the purchase that he did in the utmost good faith. It was simply a question of two innocent parties, which one should suffer—that was all—and that I would advise Mr. Warner to take back the money that he had expended in the transaction, provided the counsel fees for Mr. Warner and Mr. Richardson were paid. Judge Wilson stated on several occasions that he was satisfied the parties would not pay counsel fees; that it was a case that he thought he could settle on the conditions that I mentioned to him."

At a later stage of the proceedings, a further suggestion was made, of willingness to reconvey upon reimbursement of expenses; but there was no formal tender. The pleadings never disclosed any willingness to reconvey.

We submit that the tender claimed to have been made was not an offer such as, under any circumstances, the appellee was bound to accept. There was no statement as to the amount of counsel fees which had been paid by the appellants during the course of the prior litigation. It was no part of the duty of the appellee to reimburse the same.

To entitle the appellants to maintain the position of having

tendered at an early stage of the proceedings all the relief to which the appellee was entitled, it would have been their duty to make formal tender of a reconveyance, and to have made this without illegal exactions. At no time did the appellants offer to reconvey, unless reimbursed their counsel fees. No specific amount of expenses was named. There was nothing but a most general reference concerning the same, with a demand for counsel fees.

We submit, however, that even had there been a formal tender of reconveyance without insisting upon reimbursement of what had been paid for counsel fees, the appellee would have been justified in refusing to accept it, without being barred of her right to relief, saving upon the terms now suggested, viz., reimbursement of all the expenses of litigation. The conduct of the appellants had been most suspicious. They had acted with undue haste in pushing to a contract of sale and to a conveyance, for a consideration of $25,000, property which had been carried upon their books as agents for its sale, until a very short time antecedently, at $55,000. They had taken title not in their own name, but in that of a third person who had no interest therein. The pretext for this concealment was insufficient, viz., a desire to avoid the trouble of obtaining a joinder, in subsequent conveyances, of the wives of the real purchasers. If Richardson was married, it would have been necessary to have obtained a joinder of his wife. The reason alleged for not taking title in the name of the real purchasers borders upon the fraudulent.

In the belief that Richardson was the real grantee the original bill was filed. The answer thereto was prepared by counsel under the directions of Richardson and of at least one of the appellants. It is asserted by the gentleman who testified to the tender that the purpose of the answer was merely to set up "*bona fides*." If such was the purpose, the performance was most defective. The answer averred what was absolutely untrue, as appears from the following quotations (Record, pages 12, 13, 14) therefrom:—

> "This defendant denies the allegations of said paragraph that he parted with no valuable consideration for said

lots; that he is not an innocent holder for value, and that he has no interest, legal or equitable, in said property. This defendant denies that allegation of said paragraph that the transaction between said Stephen A. Dutton and Cora M. Dutton and this defendant was without consideration and said deed fraudulent. * * * *

"This defendant, further answering, says that he made said purchase through B. H. Warner & Co., real estate brokers; that about the tenth day of April, 1896, Ellen C. Mussey, a member of the bar of this Honorable Court, in good standing, acting for and on behalf of the said Stephen A. Dutton, offered the said real estate to his said agents for sale at and for the sum of twenty-five thousand ($25,000) dollars; that the said attorney and said Stephen A. Dutton represented to said agents that the said Stephen A. Dutton was then *bona fide* owner of said property, and desired to sell the same and realize upon the equity therein in order to use the proceeds to redeem certain valuable securities belonging to him held as collateral. Nothing was said or intimated by said Dutton or his attorney in reference to the complainant or any transaction whatever with her. This defendant through his said agents, believing the said representation and that the said Stephen A. Dutton was the actual owner of the said property which he proposed to sell, thereupon entered into the contract a copy of which is herewith filed, marked 'Exhibit L. W. R. No. 1,' and is prayed to be considered a part hereof."

Further, the answer avers, that after the Title Insurance Company had reported upon the death, "the said firm of "B. H. Warner & Co., for and on behalf of the defendant, in "good faith, in the usual course of the business," &c., deposited cash, &c.; "that upon the delivery of the said deed conveying "said property to him as aforesaid, the possession thereof was "given to this defendant through his said agents B. H. Warner "& Co., with the knowledge and consent of the complainant," &c.; that desiring the keys of the property the said B. H.

Warner & Co., "acting for and on behalf of this defendant "wrote and duly mailed and posted a letter to complainant's "mother"; and that the complainant thereupon "sent and de- "livered said keys to said B. H. Warner & Co., agents of this "defendant."

We submit that no possible justification can be found for the repeated averments, under oath, in the answer, that the defendant Richardson had really purchased the properties and that B. H. Warner & Co. had acted as his agents in making such purchase.

Being thus furnished, at the the outset of the litigation, with an answer which falsely stated the relations of Richardson to the property and being apprised of other most suspicious circumstances, the appellee was not bound, under a penalty, to accept even a complete, much less an insufficient, offer of relief, made informally to her counsel.

The appellants persisted in maintaing their right to the property in all their answers. The litigation was conducted, as the record shows, upon the basis of their assertion of their right to retain the same. How, then, could the court have directed, in addition to reimbursement of the expenses actually paid in the acquisition of the property and in the carrying of the same, that they were entitled to reimbursement of the expenses of the litigation they thus conducted for years?

Costs, as between solicitor and client, are awarded only under most extreme circumstances, against a third party. There is nothing in this case to justify compelling a litigant to pay not only her own expenses, but those of her adversary, incurred in a long-continued effort to retain from her a property to which she was found entitled.

Interest is not a right. Every expenditure made in and about the acquisition of the property, removal of incumbrances, and the care thereof, was reimbursed. Interest was not allowed because it was no part of the expenditure. Failure by the appellee to reimburse the expenditures during the period in which the appellants insisted upon retaining the title, was of course justifiable.

JOHN G. JOHNSON,
For Appellee.